

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

TONI Y. FERGUSON,

Plaintiff,

Case No. 3:17-cv-241

vs.

COMMISSIONER OF
SOCIAL SECURITY,

District Judge Thomas M. Rose
Magistrate Judge Michael J. Newman

Defendant.

REPORT AND RECOMMENDATION¹ THAT: (1) THE ALJ'S NON-DISABILITY FINDING BE FOUND UNSUPPORTED BY SUBSTANTIAL EVIDENCE, AND REVERSED; (2) THIS CASE BE REMANDED TO THE COMMISSIONER UNDER THE FOURTH SENTENCE OF 42 U.S.C. § 405(g) FOR PROCEEDINGS CONSISTENT WITH THIS OPINION; AND (3) THIS CASE BE CLOSED

This is a Social Security disability benefits appeal. At issue is whether the Administrative Law Judge (“ALJ”) erred in finding Plaintiff not “disabled” and therefore unentitled to Disability Insurance Benefits (“DIB”). This case is before the Court upon Plaintiff’s Statement of Errors (doc. 11), the Commissioner’s memorandum in opposition (doc. 13), Plaintiff’s reply (doc. 14), the administrative record (docs. 7, 10), and the record as a whole.²

I.

A. Procedural History

Plaintiff filed an application for DIB asserting disability as of August 17, 2010 as a result of a number of impairments including, *inter alia*, osteoarthritis, ischemic heart disease,

¹ Attached hereto is a NOTICE to the parties regarding objections to this Report and Recommendation.

² Hereafter, citations to the electronically-filed administrative record will refer only to the PageID number.

degenerative disc disease, status post bilateral knee arthroscopies, and status post C5-6 and C6-7 spine fusion surgeries. PageID 70.

After an initial denial of her application, Plaintiff received a hearing before ALJ Eric Anschuetz on June 3, 2016. PageID 82-107. The ALJ issued a decision on August 18, 2016 finding Plaintiff not disabled. PageID 68-77. Specifically, the ALJ found at Step Four that, based upon Plaintiff's residual functional capacity ("RFC") to perform a reduced range of light work,³ she was "capable of performing past relevant work as a leasing agent." PageID 72-77.

Thereafter, the Appeals Council denied review on May 23, 2017 making the ALJ's non-disability finding the final administrative decision of the Commissioner. PageID 46-48. *See Casey v. Sec'y of Health & Human Servs.*, 987 F.2d 1230, 1233 (6th Cir. 1993). Plaintiff then filed this timely appeal. *Cook v. Comm'r of Soc. Sec.*, 480 F.3d 432, 435 (6th Cir. 2007).

B. Evidence of Record

The evidence of record is adequately summarized in the ALJ's decision (PageID 68-77), Plaintiff's Statement of Errors (doc. 11), the Commissioner's memorandum in opposition (doc. 13), and Plaintiff's reply (doc. 14). The undersigned incorporates all of the foregoing and sets forth the facts relevant to this decision herein.

II.

A. Standard of Review

The Court's inquiry on a Social Security appeal is to determine (1) whether the ALJ's non-disability finding is supported by substantial evidence, and (2) whether the ALJ employed

³ Light work "involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds" and "requires a good deal of walking or standing, or . . . sitting most of the time with some pushing and pulling of arm or leg controls." *Id.* § 404.1567(b). An individual who can perform light work is presumed also able to perform sedentary work. *Id.* Sedentary work "involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties." *Id.* § 404.1567(a).

the correct legal criteria. 42 U.S.C. § 405(g); *Bowen v. Comm’r of Soc. Sec.*, 478 F.3d 742, 745-46 (6th Cir. 2007). In performing this review, the Court must consider the record as a whole. *Hephner v. Mathews*, 574 F.2d 359, 362 (6th Cir. 1978).

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971). When substantial evidence supports the ALJ’s denial of benefits, that finding must be affirmed, even if substantial evidence also exists in the record upon which the ALJ could have found Plaintiff disabled. *Buxton v. Halter*, 246 F.3d 762, 772 (6th Cir. 2001). Thus, the ALJ has a “‘zone of choice’ within which he [or she] can act without the fear of court interference.” *Id.* at 773.

The second judicial inquiry -- reviewing the correctness of the ALJ’s legal analysis -- may result in reversal even if the ALJ’s decision is supported by substantial evidence in the record. *Rabbers v. Comm’r of Soc. Sec.*, 582 F.3d 647, 651 (6th Cir. 2009). “[A] decision of the Commissioner will not be upheld where the [Social Security Administration] fails to follow its own regulations and where that error prejudices a claimant on the merits or deprives the claimant of a substantial right.” *Bowen*, 478 F.3d at 746.

B. “Disability” Defined

To be eligible for disability benefits, a claimant must be under a “disability” as defined by the Social Security Act. 42 U.S.C. § 423(d)(1)(A). Narrowed to its statutory meaning, a “disability” includes physical and/or mental impairments that are both “medically determinable” and severe enough to prevent a claimant from (1) performing his or her past job and (2) engaging in “substantial gainful activity” that is available in the regional or national economies. *Id.*

Administrative regulations require a five-step sequential evaluation for disability determinations. 20 C.F.R. § 404.1520(a)(4). Although a dispositive finding at any step ends the

ALJ's review, *see Colvin v. Barnhart*, 475 F.3d 727, 730 (6th Cir. 2007), the complete sequential review poses five questions:

1. Has the claimant engaged in substantial gainful activity?;
2. Does the claimant suffer from one or more severe impairments?;
3. Do the claimant's severe impairments, alone or in combination, meet or equal the criteria of an impairment set forth in the Commissioner's Listing of Impairments (the "Listings"), 20 C.F.R. Subpart P, Appendix 1?;
4. Considering the claimant's RFC, can he or she perform his or her past relevant work?; and
5. Assuming the claimant can no longer perform his or her past relevant work -- and also considering the claimant's age, education, past work experience, and RFC -- do significant numbers of other jobs exist in the national economy which the claimant can perform?

20 C.F.R. § 404.1520(a)(4); *see also Miller v. Comm'r of Soc. Sec.*, 181 F. Supp.2d 816, 818 (S.D. Ohio 2001). A claimant bears the ultimate burden of establishing disability under the Social Security Act's definition. *Key v. Comm'r of Soc. Sec.*, 109 F.3d 270, 274 (6th Cir. 1997).

III.

In her Statement of Errors, Plaintiff argues that the ALJ erred by: (1) wrongly concluding, at Step Two, that her radiculitis of the bilateral upper extremities is not a "severe" impairment (and, thereafter, wrongly declining, at Step Four, to include any corresponding limitations in her hands or upper extremities in her RFC); and (2) failing to appropriately consider the medical evidence at issue (and relying upon selected, post-date last insured evidence in finding her not disabled). Doc. 11 at PageID 879-85. Finding merit to Plaintiff's first alleged error, the undersigned does not address the merits of Plaintiff's second alleged error, but directs that it be considered by the ALJ on remand. *See infra*.

Where, as here, the ALJ finds at Step Two of the sequential review process that a claimant suffers from at least one “severe” impairment, the ALJ is required at Step Four to consider the limiting effects of *all* impairments, severe and non-severe, when determining the claimant’s RFC. *See White v. Comm’r of Soc. Sec.*, 312 F. App’x 779, 787 (6th Cir. 2009) (holding that, “[o]nce one severe impairment is found, the combined effect of all impairments must be considered, even if other impairments would not be severe”); *see also Johnson v. Colvin*, No. 3:13cv301, 2014 WL 6603376, at *7-8 (S.D. Ohio Nov. 19, 2014). If an ALJ considers the limiting effects of both severe and non-severe impairments in determining a claimant’s RFC, any error in failing to find a particular impairment severe is harmless. *White v. Comm’r of Soc. Sec.*, 312 F. App’x 779, 787 (6th Cir. 2009). “[T]o the extent an ALJ determines that an identified impairment, severe or non-severe, does not result in any work-related restrictions or limitations, the ALJ ‘is required to state the basis for such conclusion.’” *Katona v. Comm’r of Soc. Sec.*, No. 14-CV-10417, 2015 WL 871617, at *6 (E.D. Mich. Feb. 27, 2015); *see also Murray v. Colvin*, No. 3:12-0410, 2014 WL 5323061, at *12 (M.D. Tenn. Oct. 16, 2014). Failure to state the basis -- for including no limitations arising from non-severe impairments -- is error. *See Meadows v. Comm’r of Soc. Sec.*, No. 1:07cv1010, 2008 WL 4911243, at *13 (S.D. Ohio Nov. 13, 2008).

Further, “a Step Two analysis is distinct from the ALJ’s obligation [at Step Four] to consider the impact of Plaintiff’s non-severe impairments in addition to and in conjunction with Plaintiff’s severe impairments in assessing Plaintiff’s RFC.” *Singleton v. Comm’r of Soc. Sec.*, No. 3:14-cv-140, 2015 WL 2381162, at *3 (S.D. Ohio May 19, 2015) (quoting *Katona*, 2015 WL 871617, at *6) (brackets added). Here, the ALJ included no limitations arising from Plaintiff’s impairments regarding the use of her hands and fingers simply because “[Plaintiff’s] bilateral hand condition did not cause more than minimal functional impairment and was not

‘severe[,]’... no limitations for handling, fingering, or other use of the hands and upper extremities have been included in [her RFC].” PageID 71. In other words, the ALJ found no limitations arising from Plaintiff’s bilateral hand impairment, in part, because this impairment was not severe. *Id.* Such conclusion is error because it conflates the distinct steps of the sequential review process and fails to reasonably explain the absence of limitations arising from Plaintiff’s bilateral hand impairment. This error is not harmless. *See Meadows*, 2008 WL 4911243, at *13.

Accordingly, because the ALJ failed to consider Plaintiff’s bilateral hand impairments in determining her RFC, the undersigned finds the ALJ’s non-disability finding should be reversed.

IV.

When, as here, the ALJ’s non-disability determination is unsupported by substantial evidence, the Court must determine whether to reverse and remand the matter for rehearing or to reverse and order the award of benefits. The Court has authority to affirm, modify or reverse the Commissioner’s decision “with or without remanding the cause for rehearing.” 42 U.S.C. § 405(g); *Melkonyan v. Sullivan*, 501 U.S. 89, 100 (1991). Generally, benefits may be awarded immediately “only if all essential factual issues have been resolved and the record adequately establishes a plaintiff’s entitlement to benefits.” *Faucher v. Sec’y of Health & Human Servs.*, 17 F.3d 171, 176 (6th Cir. 1994); *see also Abbott v. Sullivan*, 905 F.2d 918, 927 (6th Cir. 1990); *Varley v. Sec’y of Health & Human Servs.*, 820 F.2d 777, 782 (6th Cir. 1987).

Remand for further proceedings is necessary in this instance so that the ALJ can properly evaluate Plaintiff’s bilateral hand impairment in conjunction with her other impairments, properly determine her RFC, and assess her disability status anew.

V.

IT IS THEREFORE RECOMMENDED THAT:

1. The Commissioner's non-disability finding be found unsupported by substantial evidence, and **REVERSED**;
2. This case be **REMANDED** to the Commissioner under the Fourth Sentence of 42 U.S.C. § 405(g) for proceedings consistent with this opinion; and
3. This case be **CLOSED**.

Date: March 19, 2018

s/ Michael J. Newman
Michael J. Newman
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within **FOURTEEN** days after being served with this Report and Recommendation. This period is not extended by virtue of Fed. R. Civ. P. 6(d) if served on you by electronic means, such as via the Court's CM/ECF filing system. If, however, this Report and Recommendation was served upon you by mail, this deadline is extended to **SEVENTEEN DAYS** by application of Fed. R. Civ. P. 6(d). Parties may seek an extension of the deadline to file objections by filing a motion for extension, which the Court may grant upon a showing of good cause.

Any objections filed shall specify the portions of the Report and Recommendation objected to, and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based, in whole or in part, upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs.

A party may respond to another party's objections within **FOURTEEN** days after being served with a copy thereof. As noted above, this period is not extended by virtue of Fed. R. Civ. P. 6(d) if served on you by electronic means, such as via the Court's CM/ECF filing system. If, however, this Report and Recommendation was served upon you by mail, this deadline is extended to **SEVENTEEN DAYS** by application of Fed. R. Civ. P. 6(d).

Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140, 153-55 (1985); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981).